

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TAMIE JENSEN, individually and on behalf of
all others similarly situated,

Plaintiff,

vs.

ROTO-ROOTER SERVICES COMPANY, an
Iowa company,

Defendant.

No. 2:20-cv-00223-JCC

MOTION FOR STAY

NOTE ON MOTION CALENDAR:
FRIDAY, APRIL 3, 2020

The constitutionality and interpretation of the statutory provisions at issue in this case are currently under review by the Supreme Court of the United States. While the Supreme Court considers whether to issue opinions that could render this case moot, Plaintiff Tamie Johnson (“Plaintiff”) filed a class action complaint against Defendant Roto-Rooter Services Company (“Defendant”) for allegedly violating the statutory provisions before the Supreme Court, and thus forced Defendant to engage in costly class action litigation when there is serious risk that this case must be dismissed after the Supreme Court issues its ruling(s). In the interest of all parties to this case and in the interest of judicial economy, Defendant moves the Court for a stay of all

MOTION FOR STAY – 1
Cause No.: 2:20-cv-00223-JCC

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proceedings in this case pending the Supreme Court’s decision in *Barr v. American Association of Political Consultants*, Appeal No. 19-631, *Facebook, Inc. v. Duquid*, Appeal No. 19-511, and *Charter Communications, Inc. v. Gallion*, Appeal No. 19-575.

I. BACKGROUND

Plaintiff’s claim arises out of the Telephone Consumer Protection Act (the “TCPA”). Generally speaking, the TCPA “prohibits the use of certain kinds of automated dialing equipment to call wireless telephone numbers absent advance consent.” *ACA Int’l v. FCC*, 885 F.3d 687, 691 (D.C. Cir. 2018). Here, Plaintiff alleges that Defendant (or Defendant’s agent) violated a subsection of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), by sending “unsolicited text messages” to her and the putative class. (Compl. at ¶¶ 16, 30, Dkt. No. 1.)

The TCPA, and Section 227(b)(1)(A)(iii) in particular, has been a focus of significant appellate disagreement. *See Seefeldt v. Entm’t Consulting Int’l*, No. 4:19-CV-00188, 2020 U.S. Dist. LEXIS 31815, at *3 (E.D. Mo. Feb. 25, 2020) (“The TCPA has been the subject of much appellate discourse lately.”). Just recently in 2018, the D.C. Circuit invalidated over 10 years’ worth of interpretative guidance from the Federal Communications Commission (the “FCC”), *ACA Int’l*, 885 F.3d at 691, which directly affected the definition and understanding of “automated dialing equipment” (also known as an “autodialer”), which lies at the “heart of the TCPA’s prohibitive mandates,” *Seefeldt*, 2020 U.S. Dist. LEXIS 31815, at *4. Since the D.C. Circuit’s decision, federal courts have disagreed about the “autodialer” definition. *Compare Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) (expanding definition of autodialer) *with Glasser v. Hilton Grand Vacations Company, LLC*, 2020 U.S. App. LEXIS 2481 (11th Cir. Jan. 27, 2020) (narrowing definition), *Dominguez v. Yahoo*, 894 F.3d 116 (3d Cir. 2017) (ruling consistent with *Glasser*).

1 The definition of “autodialer” is only one aspect of the TCPA debate. In 2015, Congress
 2 amended Section 227(b)(1)(A)(iii) (the provision at issue in this case) to include a “debt-collection
 3 exemption,” which excepted a class of otherwise impermissible TCPA communications from the
 4 TCPA. *See Am. Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 162 (4th Cir. 2019).
 5 The Fourth Circuit Court of Appeals found the exception to be unconstitutional and severed the
 6 exception to save the TCPA as a whole. *Id.* at 171–72; *see also Seefeldt*, 2020 U.S. Dist. LEXIS
 7 31815, at *3 (describing decision to sever).

8 The definition of an autodialer, the constitutionality of Section 227(b)(1)(A)(iii), and the
 9 severability of any unconstitutional provision in Section 227(b)(1)(A)(iii) are issues that this Court
 10 will confront in this case. Fortunately, these complications could all be soon resolved. The
 11 Supreme Court is currently considering how the TCPA is affected by these appellate quagmires in
 12 three cases: *Barr*, *Duquid*, and *Gallion*. The Court accepted *Barr* and will consider whether the
 13 government-debt exception is constitutional and, if not, whether the provision is severable. As
 14 one court put it, the Court’s decision in *Barr* “risks a potential total collapse of the TCPA without
 15 regard to the definitional problem. It seems likely that decision, at minimum, will come this term
 16 (oral argument has been set for April 22, 2020)” *Id.* at *9. In other words, there is a risk the
 17 Supreme Court could strike down the TCPA entirely, thus requiring complete dismissal of the
 18 above-captioned case.

19 *Duquid* and *Gallion* also involve challenges to the TCPA, with issues ranging from
 20 constitutionality to the definition of “autodialers.” *See Gallion v. United States*, 772 F. App’x 604,
 21 605 (9th Cir. 2019) (describing *Duquid* and severing unconstitutional provision). The definition
 22 of “autodialer” will be a focus of this case. The Supreme Court has not yet decided whether to
 23 accept *Duquid* and *Gallion*.

1 There is substantial need for certainty on what is and what is not an autodialer before this
 2 case proceeds, and there must be certainty whether Plaintiff can even allege a violation of the
 3 TCPA if the TCPA is unconstitutional as a whole. Because the constitutionality of the TCPA issue
 4 has been accepted by the Supreme Court in *Barr*, and that issue itself could be dispositive of this
 5 case, and because the definition of “autodialer” could be affected by accepting or declining
 6 certiorari in other cases, Defendant moves for a stay of all proceedings pending a ruling from the
 7 Supreme Court in *Barr*, *Duquid*, and *Gallion*.

8 **III. LEGAL STANDARD**

9 This Court has the power to stay this action pursuant to the “power inherent in every court
 10 to control the disposition of the cases on its docket with economy of time and effort for itself, for
 11 counsel, and for litigants.” *Landis v. No. American Co.*, 299 U.S. 248, 254 (1936). The Court
 12 may enter a stay when the Court finds “it is efficient for its own docket and the fairest course for
 13 the parties . . . pending resolution of independent proceedings which bear upon the case.”
 14 *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007)
 15 (quotation omitted).

16 Whether to grant a stay is in this Court’s discretion. *See Lockyer v. Mirant Corp.*, 398 F.3d
 17 1098, 1109 (9th Cir. 2005) (citation omitted) (district courts have the “discretionary power to stay
 18 proceedings”). The Court must weigh the “competing interests which will be affected by the
 19 granting or refusal to grant a stay.” *Robledo v. Randstad US, L.P.*, No. 17-CV-01003, 2017 U.S.
 20 Dist. LEXIS 181353, at *3–4 (N.D. Cal. Nov. 1, 2017) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265,
 21 268 (9th Cir. 1962)). These interests include (1) the possible damage resulting from the stay, (2)
 22 the hardship or inequity a party may suffer if required to go forward, and (3) the orderly course of
 23

1 justice measured in terms of simplifying or complicating issues, proof, and questions of law. *Hall*,
 2 300 F.2d at 268.

3 IV. ARGUMENT

4 *Barr*, *Duquid*, and *Gallion* are before the Supreme Court, and each case will have a
 5 significant impact on this litigation. Although the Supreme Court has not yet decided whether to
 6 accept *Duquid* and *Gallion*, the Supreme Court accepted *Barr* and could issue a decision that
 7 requires dismissal of this case. Therefore, on balance, the interests of the parties and the Court
 8 weigh in favor of granting a stay pending a decision in *Barr*, *Duquid*, and *Gallion*.

9 A. The Potential Prejudice or Hardship to the Parties Weighs in Favor of a 10 Stay.

11 As for the first (damage caused by stay) and second (hardship to Defendant if stay is not
 12 granted) factors, the balance of the potential prejudice or hardship weighs in favor of a stay. As
 13 for Plaintiff, Plaintiff will suffer little (if any) harm should the Court stay this case. Plaintiff's only
 14 potential damage is that of a delayed final judgment. Delay, however, is not sufficient to avoid a
 15 stay. As courts throughout the Ninth Circuit have recognized, a delay in recovering potential
 16 monetary damages is not sufficient prejudice to warrant the denial of a stay of proceedings. *See*,
 17 *e.g.*, *CMAX, Inc. v. Hall*, 300 F.2d 265, 268–69 (9th Cir. 1962) (noting that a delay in proceedings
 18 would only delay recovery of damages and thus the non-movant had “not made a strong showing
 19 in support of its assertion that it will suffer irreparable damage and a miscarriage of justice”); *In*
 20 *re Am. Apparel S’holder Derivative Litig.*, No. CV-10-06576, 2012 U.S. Dist. LEXIS 146970, at
 21 *155 (C.D. Cal. July 31, 2012) (“A delay in recovering potential monetary damages is not
 22 sufficient prejudice to warrant denial of a stay.”); *Liberty Surplus Ins. Corp. v. IMR Contractors*

1 *Corp.*, No. CV-08-5773, 2009 U.S. Dist. LEXIS 37580, at 11 (N.D. Cal. Apr. 14, 2009) (“Further,
2 a delay in recovering potential monetary damages is not sufficient harm to warrant a stay.”).

3 This conclusion is particularly appropriate when, as is the case here, the Complaint
4 suggests Plaintiff has not actually suffered harm or will suffer harm in the future should the Court
5 not immediately intervene. Although Defendant acknowledges the law in this Circuit (while
6 reserving the right to appeal that issue) that Plaintiff suffered injury to confer standing, *Van Patten*
7 *v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042 (9th Cir. 2017), Plaintiff has not alleged that
8 she is entitled to any monetary relief related to any actual injury suffered because of the allegedly
9 inappropriate text messages. Rather, her only allegation is that she is entitled to statutory damages
10 because of a violation. See Compl. ¶ 30, Dkt. No. 1. These damages will not change while this
11 case has been stayed, as the alleged violations have already occurred and the computation of
12 damages is a mere calculation. Additionally, Plaintiff has not alleged that she (or any putative
13 class member) received allegedly unauthorized text messages after January 14, 2020, or that this
14 Court must quickly intervene to prevent future harm. Accordingly, Plaintiff will suffer little (if
15 any) harm if a stay is granted.

16 The same cannot be said for Defendant if the stay is denied. Courts recognize that
17 defendants bear the cost and inconvenience of asymmetric discovery in class action litigation. *See,*
18 *e.g., Am. Bank v. City of Menasha*, 627 F.3d, 266 (7th Cir. 2010) (Posner, J.) (explaining that class
19 action plaintiffs use “discovery to impose asymmetric costs on defendants in order to force a
20 settlement advantageous to the plaintiff regardless of the merits of his [or her] suit.”). Not
21 surprisingly, therefore, when the Supreme Court granted certiorari in *Spokeo Inc. v. Robins*, 575
22 U.S. 982, 191 L. Ed. 2d 762 (2015), a case addressing standing under substantially similar legal
23 issues present in this case, district courts did not hesitate to stay proceedings pending the Supreme

1 Court's review of a dispositive issue. *See, e.g., Larroque v. First Advantage LNS Screening Sols.*,
 2 No. 15-CV-04684, 2016 U.S. Dist. LEXIS 139, at *5 (N.D. Cal. Jan. 4, 2016 ("In contrast,
 3 Defendant will suffer significant hardship if the case is not stayed because it will be required to
 4 defend a large putative class action – engaging in expensive discovery and possibly class
 5 certification briefing – that may be rendered moot and unnecessary within the next six months by
 6 the *Spokeo* decision."); *Davis v. Nationstar Mortg., LLC*, No. 15-CV-4944, 2016 U.S. Dist. LEXIS
 7 252, at *10 (E.D. Pa. Jan. 4, 2016) ("Defendants, by contrast, could be prejudiced if forced to
 8 expend substantial resources in litigation only for *Spokeo* to rule that this Court lacks jurisdiction
 9 to resolve this case."). If a stay is denied, Defendant will be forced to fully litigate this case, all
 10 while the Supreme Court could dispose of matters germane to this litigation.

11 On balance, Defendant submits that any harm it suffers by the denial of a stay outweighs
 12 any prejudice (if any) suffered by Plaintiff if the stay is granted. In fact, rather than harm parties
 13 by the issuance of any stay, a stay benefits all parties by preventing unnecessary upfront class
 14 action litigation expenses for Plaintiff and a costly defense for Defendant, all while this case may
 15 become moot after the Supreme Court addresses the constitutionality of the statutory provision at
 16 issue in this case. *Cf. Seefeldt*, 2020 U.S. Dist. LEXIS 31815, at *10–11 (recognizing a stay
 17 benefits both parties and the Court in light of *Barr*). This is particularly true when, as is the case
 18 here, the Supreme Court's rulings could either dispose of this case or significantly limit dispositive
 19 motions and debatable issues. *See Bechtel Corp. v. Laborers' Int'l Union*, 544 F.2d 1207, 1215
 20 (3d Cir. 1976) (noting the possibility that a party's claims will moot the litigation is "sufficient
 21 justification to warrant the stay"); *Waltman v. Dorel Juvenile Grp., Inc.*, No. 07-04029, 2009 U.S.
 22 Dist. LEXIS 77025, at *6 (E.D. Pa. Aug. 26, 2009 ("While the Court cannot predict with certainty
 23 how the Superior Court and/or Supreme Court of Pennsylvania will rule, the possibility that either

1 court may rule that the release is valid, a ruling that would be dispositive of this entire case, is
 2 sufficient justification to warrant the stay.”).

3 On balance, the first and second factors relevant to a stay analysis weigh in favor of
 4 granting a stay in this case. Any prejudice (if any) to Plaintiff is minimal if a stay is granted.
 5 Defendant, however, will be significantly prejudiced if it is required to unnecessarily bear the
 6 burden of costly class action litigation, all while a pending case before the Supreme Court could
 7 dispose of this action. Accordingly, Defendant’s motion for stay should be granted.

8 **B. The Interests of Judicial Economy Weigh in Favor of a Stay.**

9 The third and final factor (the orderly course of justice) also weighs in favor of a stay. As
 10 an initial matter, this case is still in its infancy, with the Complaint having only recently been filed,
 11 thus making any stay manageable for the parties and the Court. *See St. Louis Heart Ctr., Inc. v.*
 12 *Athenahealth, Inc.*, No. 4:15-CV-01215, 2015 U.S. Dist. LEXIS 150776, at *13 (E.D. Mo. Nov.
 13 4, 2015) (staying a TCPA action where a Supreme Court decision was pending for, among other
 14 reasons, the “very young” age of the case).

15 Moreover, the constitutionality of the TCPA and the interpretation of the very provisions
 16 that will be at issue in this case are currently matters pending before the Supreme Court. The
 17 Supreme Court has already accepted one of those issues in *Barr*, and the Court may very well
 18 accept all of the issues as well. Should the motion be denied, the Court will certainly need to
 19 address Defendant’s motions to dismiss, the inevitable class and discovery-related motions, and
 20 potentially, additional dispositive motions – all while the Supreme Court could issue a ruling that
 21 disposes of this case entirely. As the Eastern District of Missouri recognized, a stay is
 22 “appropriate” under the circumstances to “avoid exhausting judicial resources to decide things like
 23 defendants’ multifaceted motion to dismiss, plaintiff’s pending motion for class certification, and

any possible discovery-related matters or summary judgment motions to follow which may prove fruitless. A (relatively) young case, at least from the standpoint of litigation efforts, if not time alone, favors staying this action.” *Seefeldt*, 2020 U.S. Dist. LEXIS 31815, at *11.

Under the circumstances, Defendant submits that the orderly course of justice is simplified by a stay of proceedings so that the Supreme Court can issue its rulings and provide a roadmap for the parties and the Court to follow. *See In re Sprouts Farmers Mkt.*, No. MDL-16-02731, 2017 U.S. Dist. LEXIS 80323, *8–9 (D. Ariz. May 24, 2017) (“The Court finds that a stay is in the orderly course of justice, and in the interest of judicial economy, because the Supreme Court’s *Morris* decision may foreclose Plaintiff’s class claims. Thus, granting a stay may conserve resources which could be unnecessarily expended reviewing the adequacy of the pleadings, resolving discovery disputes, considering class certification, and deciding dispositive motions.”).¹ Therefore, on balance, the orderly course of justice weighs in favor of a stay so that the Supreme Court can simplify matters in this case and, potentially, dispose of this case entirely.

V. CONCLUSION

This Court should stay all proceedings pending the Supreme Court’s decisions in *Barr*, *Duquid*, and *Gallion*. The Supreme Court is positioned to simplify threshold issues in this case. In sum, the balance of the relevant factors weigh in favor of a stay. Therefore, Defendant moves

¹ See also *Cnty. State Bank v. Strong*, 651 F.3d 1241, 1247 (11th Cir. 2011) (noting that the court had previously “stayed its . . . proceedings” in the case “to await the Supreme Court’s decision in *Vaden* [*v. Discover Bank*, 556 U.S. 49 (2009)], which raised a substantially similar jurisdictional question”); *Ass’n for Disabled Americans, Inc. v. Fla. Int’l Univ.*, 405 F.3d 954, 956 (11th Cir. 2005) (noting that the “appeal was stayed pending the Supreme Court’s decision in *Tennessee v. Lane*”); *Colby v. Publix Super Mkts., Inc.*, No. 11-0590, 2012 WL 2357745, at *2–3 (N.D. Ala. 2012); *accord, Anker v. Wesley*, 670 F. Supp. 2d 339, 341 (D. Del. 2009) (proceedings stayed after Supreme Court’s grant of certiorari in relevant case); *Henderson v. Campbell*, No. 98-4837, 2007 WL 781966, at *3 (N.D. Cal. 2007) (same), *aff’d*, 322 F. App’x 551 (9th Cir. 2009); *Odneal v. Dretke*, 435 F. Supp. 2d 608, 611 (S.D. Tex. 2006) (same), *rev’d in part on other grounds*, 324 F. App’x 297 (5th Cir. 2009) (per curiam); *Michael v. Ghee*, 325 F. Supp. 2d 829, 831–33 (N.D. Ohio 2004) (same).

1 the Court to stay these proceedings pending a decision in the aforementioned Supreme Court cases.
2 Defendant submits that it will be responsible for notifying the Court of any change in status of
3 those cases should the Court determine that any change in the stay is warranted based on the
4 Supreme Court's pronouncements.

5
6 Dated this 18th day of March, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, competent to be a witness herein.

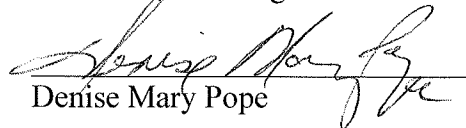
On the date given below I caused to be served a true and correct copy of the foregoing **MOTION TO STAY** on the following individuals via the Court's ECF service:

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DATED this 18th day of March, 2020 at Seattle, Washington.


Denise Mary Pope